IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1518 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MOHANBHAI DAHYABHAI ALIAS NANDI KOLI PATEL

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 1518 of 2001

MS DR KACHHAVAH for Petitioner No. 1

MR BINODA GAJJAR AGP for Respondent No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 11/09/2001

ORAL JUDGEMENT

1. In exercise of the powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ('the Act' for short), Commissioner of Police, Surat City, Surat, vide order dated February 8, 2001, Annexure A to the petition, detained the petitioner-detenu.

2. The averments made in the petition and the grounds of detention manifest that the detaining authority has considered the detenu as a bootlegger within the meaning of section 2 (b) of the Act and as three cases under the Prohibition Act are registered against the detenu which are still pending and statements of two witnesses are also recorded on January 15, 2001, according to the detaining authority, the activities of the detenu are prejudicial to the maintenance of public order and, therefore, powers under Section 9 (2) of the Act were exercised by the detaining authority.

3. By filing this petition under Article 226 of the Constitution, the petitioner has challenged the order of detention on various grounds and prayed to issue a writ of habeas corpus or any other appropriate writ, order or direction quashing and setting aside the order of detention dated February 8, 2001 and prayed to set him at liberty forthwith.

4. The petitioner has challenged the order of detention on various grounds. However, Ms. Kachhavah, learned advocate for the petitioner has restricted her arguments to the fact that the subjective satisfaction recorded by the detaining authority in exercise of powers under Section 9 (2) of the Act cannot be considered as genuine. In order to substantiate her submission, reliance is placed on the statements of two witnesses which were recorded on January 15, 2001 and verified by the detaining authority on February 6, 2001 and on the basis of the said statements, order of detention came to be passed on February 8, 2001. Besides this, while passing the order of detention, contemporaneous records of the petitioner - detenu were not considered by the detaining authority and it reflects the non-application of mind by the detaining authority while passing the order of detention. She contended that the detaining authority has not properly exercised the powers under Section 9 (2) of the Act which vitiates the order of detention.

5. Ms. Gajjar, learned AGP has opposed this petition. However, she does not dispute the factual aspects of the recording of the statements of witnesses on January 15, 2001 which were verified on February 6, 2001 and order of detention came to be passed on February 8, 2001. There is no manner of doubt that the detaining authority has taken into consideration the three cases registered against the detenu under the Prohibition Act as well as two statements of the witnesses but before coming to the subjective satisfaction the contemporaneous

records of the petitioner were not considered.

6. A Division Bench of this Court in the case of Kajalben v. Commissioner of Police, 2000 (1) GLH 320 has laid down law with respect to claiming of the privilege under section 9 (2) of the Act by the detaining authority. In the said case it is further held that withholding the names and addresses of the witnesses by the detaining authority has prejudiced the right of the detaining of making an effective representation and, therefore, the order of detention was set aside.

7. It is seen that no reply affidavit is filed by the detaining authority supporting the claim of the privilege exercised under Section 9 (2) of the Act though it is stated in the order of detention as to why names, addresses and occupation of the witnesses were not supplied but in the absence of corroborative evidence in the form of affidavit it cannot be held that the detaining authority has exercised the privilege under Section 9 (2) of the Act in its proper perspective. On this sole ground, the order of detention stands vitiated and the petition deserves to be allowed.

8. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order of detention dated February 8, 2001 passed against the petitioner - detenu is quashed and set aside. The detenu is ordered to be set at liberty forthwith if he is not required in connection with any other case. Rule is made absolute with no order as to costs. Direct service is permitted.

(A.M. Kapadia, J.)

(karan)